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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1974

MINOR MOODY,

PETITIONER

V.

NO 74-6632

LOREN DAGGETT, WARDEN,
U.S. Penitentiary
Leavenworth, KS,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE TENTH CIRCUIT

SUBMITTED BY:

MINOR MOODY, PRO SE
U.S. Penitentiary
Leavenworth, KS 66048

PREPARED BY:

ROGER LEE WOODS
U.S. Penitentiary
Leavenworth, KS 66048

This Writ is sought to review a decision entered by the Court of Appeals for the Tenth Circuit on May 7, 1975. The decision is not reported, and is attached as Exhibit A.

JURISDICTION

Jurisdiction of the Court is invoked pursuant to 28 USC 1254(1).

STATEMENT OF THE CASE

Moody received a ten-year federal sentence in February, 1962, served four years and three months and was paroled. In 1971, he was arrested on a new federal charge and was given a new sentence. The U.S. Board of Parole (Board) placed a detainer against him for violation of parole on the 1962 conviction. The Board has refused to execute the detainer. Relying on the case of of Small v Britton, 500 F2d 299, (CA 10, 1974), the District Court dismissed the petition.

On appeal from the District Court, the Court of Appeals denied leave to proceed in forma pauperis, citing Small v Britton, supra, as grounds for the refusal.

ISSUE PRESENTED FOR REVIEW

WHEN A FEDERAL PRISONER IS IN CUSTODY ON ONE SENTENCE AND HAS A PAROLE DETAINER WARRANT FROM AN OLDER FEDERAL PAROLE, MUST THE PAROLE BOARD EXECUTE THE DETAINER WARRANT?

ARGUMENT

In refusing to allow leave to appeal in forma pauperis, the appellate court relied on Small v Britton, 500 F2d 299. Small is at variance with the decision of this Court in Morrisey v Brewer, 408 US 471 (1972); Gagnon v Scarpelli, 411 US 778; and Braden v 30th Judicial Dist Ct of Ky, 93 S Ct 1123 (1973). The appellate court also ignored explicit Congressional command by law, 18 USC 4207, pre-Morrisey law that mandates a prompt parole violation hearing for federal prisoners and federal parolees.

The question to be resolved is whether the U.S. Board of Parole is required to execute a federal parole violation warrant when a parolee received a new federal sentence while on the parole and is then incarcerated in a federal prison. The Tenth Circuit has said a parolee has no right to a prompt hearing, and that the Board may execute the warrant when they please. Small v Britton, supra. The Eighth Circuit, in Cooper v Lockhart, 489 F2d 308 (1973) reached a contrary result in a case involving a detainer from Minnesota on an Arkansas prisoner.

This Court, in both Morrisey v Brewer, supra and Gagnon v Scarpelli, supra, ruled the Due Process Clause applies to revocations of parole and probation.

Further, in deciding when a person is "in custody" for the purpose of habeas corpus and for execution of detainers, the Court held, in Braden v 30th Jud Dist Ct of Ky, supra, that a detainer is "custody" Therefore, when the Board issued a warrant and lodged it against Moody, he was in "custody" for the purpose of habeas corpus, in custody of the Board. Once a parolee is in "custody" of the Board, the rights enumerated in Morrisey, supra, come into play. Recognizing

that whether any procedural protections are due depends on the extent to which an individual would be condemned to suffer grevious loss, the Morrisey Court held a parolee was entitled to:

1. A preliminary hearing to determine whether there is probable cause or reasonable grounds to believe that the arrested parolee has committed acts that would constitute a violation of parole. Compare, Goldberg v Kelly, 397 US at 267-271.

2. A revocation hearing that must be tendered "within a reasonable time after the parolee is taken into custody," Morrisey, supra, (Emphasis supplied), at which the parolee would be given an opportunity to contest the allegation.

Morrisey is dispositive of the issue. Other courts that have considered the issue in the light of Morrisey have reached results contrary to the Tenth Circuit. The District Court of the District Court in District of Columbia on three occasions has ruled the Board must execute parole violation detainers. See: Sutherland v D.C. Board of Parole, 366 F Supp 270 (1973); Jones v Johnston, 368 F Supp 572; and Fitzgerald v Sigler, 372 F Supp 889. The Sutherland court was faced with a case where the petitioner was on parole and under supervision of the D.C. Board of Parole. While on parole, Sutherland was convicted on a new federal charge and sentenced to ten years. The court said:

> It is firmly established that a parole board secures its jurisdiction over a parolee by issuing a violation warrant before the date of parole expiration...
>
> Plantiff's due process claim, on the other hand, raises a substantial constitutional question. It has long been recognized in this Circuit that "the issuance of a violator warrant triggers a process which, as a matter of fundamental fairness, must be pursued with reasonable diligence and with reasonable dispatch." Shelton v United States Bd of Parole, 388 F2d 567 (1967), supra, at 574. See also Hyser v Reed, 115 US App D.C. 254, 318 F2d 225 (1963). A prompt revocation hearing is essential because delay may result in the loss of essential witnesses or documentary evidence and the continuation of unnecessary incarceration or other limitations on personal liberty.
> At 271.

It is true the Shelton case cited in Sutherland exempted from a revocation hearing all warrants citing a criminal conviction as the reason for revocation, declaring no hearing at all is required in such cases because the fact of violation has already been established by a court. Shelton, supra, at 573. The decision in Morrisey effectively overruled that portion of Shelton. The Sutherland recognized this:

> Thus, a revocation hearing to adduce evidence on these matters is of vital importance even to a parolee whose parole violation has already been established by a court of law. Moreover, delay in holding the hearing could substantially prejudice such a parolee. Not only might mitigating evidence be lost during the years of intervening incarceration, see Jenkins v United States, 337 F Supp 1368 (D.Conn., 1972), but the parolee could be arbitrarily deprived of the opportunity to have his reincarceration, if ordered, run concurrently with the remainder of his intervening sentence. The maintenance of a detainer against an inmate whose parole will never actually be revoked has other undesirable effects, triggering an unnecessary loss of prison privileges and hampering rehabilitation by placing the parolee's future into a state of prolonged uncertainty.
>
> . . . Shelton no longer requires a contrary result, because it has been effectively overruled by the Supreme Court's decision in Morrisey v Brewer. . . which held that the Fifth Amendment requires not only a prompt revocation hearing but also an earlier preliminary hearing "near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available."
>
> 366 F2d at 272

Even though the petitioners in Morrisey had not been convicted of crimes while on parole, the language in that decision is broad enough to encompass the petitioner. This Court stressed the importance of the revocation hearing as a forum for issues other than the simple fact of parole violation, Morrisey, supra, at 479-480, and stated that the hearing could be simplified by hearing that bars evidence on the parole violation itself if such violation had previously been established by a criminal conviction. Id, at 490. A conviction during parole may alter the content of the revocation hearing, but it does not dispense with the requirement that such a hearing be promptly held. See, Gagnon v Scarpelli, 411 US 778, 790.

In Jones v Johnston, supra, the District Court, relying on Sutherland, ordered dismissal of a detainer warrant where there was a three year period the parole violation warrant of the Board remained unexecuted. To the same effect, is Fitzgerald v Sigler, supra.

The Court should grant certiorari, reverse the decision of the Tenth Circuit, and direct the dismissal of the parole violation warrant.

Respectfully submitted,

Minor Moody

PROOF OF SERVICE

I certify that on this date, I mailed a copy of this Petition to:

Solicitor General

Washington, D.C. 20534

May 13, 1975

ROGER LEE WOODS
Inmate Legal Researcher
U.S. Penitentiary
Leavenworth, KS 66048

D. B. TOLEFREE PAROLE OFFICER
U. S. PENITENTIARY
LEAVENWORTH, KANSAS 66048
AUTHORIZED BY ACT OF JULY
7, 1955, TO ADMINISTER
OATHS (18 U.S.C. 4004).

MARCH TERM - May 7, 1975

FILED
MAY 9 1975
ARTHUR G. JOHNSON, Clerk
By Deputy Clerk

Before Honorable Oliver Seth, Honorable Robert H. McWilliams and Honorable James E. Barrett, Circuit Judges

A true copy
Teste
Howard K. Phillips
Clerk, U. S. Court of Appeals, Tenth Circuit
By Deputy Clerk

MINOR MOODY,

Petitioner-Appellant,

vs. No. 75-1199

LOREN DAGGETT, Warden, U. S. Penitentiary,

Respondent-Appellee.

This matter comes on for consideration of Moody's request for leave to proceed in forma pauperis on appeal from a denial of habeas corpus relief by the United States District Court for the District of Kansas.

Moody was paroled from a federal sentence February 12, 1962. He is currently serving a sentence of ten years imposed on December 6, 1971, by the United States District Court for the District of Arizona. The United States Board of Parole has lodged a detainer against Moody based on a parole violator's warrant from his first sentence. The Board plans to execute the warrant when Moody is released from his 1971 sentence. Moody alleges that failure of the Board to execute the warrant and provide him with a parole revocation hearing violates the requirements of Morrissey v. Brewer, 408 U.S. 471 (1972.)

Moody's claim is clearly without merit under our holding in Small v. Britton, 500 F.2d 299 (10th Cir. 1974). Accordingly, leave to proceed in forma pauperis is denied.

Ex A

Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

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UNITED STATES OF AMERICA

STATE OF KANSAS

COUNTY OF LEAVENWORTH

AFFIDAVIT IN FORMA PAUPERIS----------

Having appeared before me in person, and having been first duly sworn

Minor Moody, deposes and says:

THAT HE IS A CITIZEN OF THE UNITED STATES OF AMERICA; THAT HE IS OVER THE AGE OF TWENTY - ONE (21) YEARS; THAT HE IS THE PETITIONER IN THE ABOVE ENTITLED CAUSE, THAT HE FEELS HE HAS A GOOD AND JUST CAUSE OF ACTION AGAINST THE NAMED RESPONDENTS, THAT HE IS AN INDIGENT PERSON WITH PERSONAL FUNDS IN THE AMOUNT OF 14.24; AND THAT HE IS THEREFORE UNABLE TO PAY THE COSTS OF PROSECUTING THE ABOVE ACTION AND REQUESTS TO BE PERMITTED TO PROCEED IN FORMA PAUPERIS ON TYPE-WRITTEN BRIEFS AND RECORDS. (Title 28 U.S.C., Section 1915.)

X Minor Moody
Signature of Affiant
Box Number

SUBSCRIBED AND SWORN TO BEFORE ME THIS

13 DAY OF May (Month), 1975 (Year)

[illegible], Notary Public.

My Commission Expires: (Month) (Day) (Year)

D. B. TOLEFREE PAROLE OFFICER
U. S. PENITENTIARY
LEAVENWORTH, KANSAS 66048
AUTHORIZED BY ACT OF JULY 7, 1955, TO ADMINISTER OATHS (18-U.S.C. 4004).

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